M3 TECHNOLOGIES (ASIA) BHD & ANOR
v. VOON SZE LIN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
YUSRIN FAIDZ YUSOFF JC
[SUIT NO: WA-22IP-41-07-2021]
27 JANUARY 2025

Abstract – *When an Anton Piller order is found to be improperly granted, the affected party is entitled to seek damages. The damages may include: (i) special damages which are recoverable for quantifiable financial losses directly resulting from the order, such as costs incurred in complying with associated court orders; (ii) general damages for distress, embarrassment, and mental anguish caused by the execution of the order. The length of the execution, and the invasion of private spaces are factors to be taken into account. While legal fees themselves are not special damages, the financial burden of litigation can be factored into general damages; (iii) aggravated damages which may be awarded when the applicant's conduct in obtaining the order is particularly egregious, such as introducing false evidence or acting with malice, to compensate for heightened distress and to express the court's disapproval.*

DAMAGES: *Assessment – Anton Piller order – Anton Piller order granted by High Court set aside by Court of Appeal – Assessment of damages payable – Whether damages incurred resulted from order – Quantum of damages entitled to, considering relevant factors and impact of failed order – Whether entitled to special, general, aggravated and exemplary damages – Factors considered in awarding damages*

CIVIL PROCEDURE: *Judgments and orders – Anton Piller order – Anton Piller order granted by High Court set aside by Court of Appeal – Assessment of damages payable – Whether damages incurred resulted from order – Quantum of damages entitled to, considering relevant factors and impact of failed order – Whether entitled to special, general, aggravated and exemplary damages – Factors considered in awarding damages*

The plaintiffs had marketed software products for over 20 years. The second to eight defendants were former/current employees of the plaintiffs. Amaz Digital Sdn Bhd ('ninth defendant') was incorporated shortly after the resignation of some of the defendants, with its directors and shareholders being former employees. It was the plaintiffs' case that (i) the ninth defendant had launched products mirroring the plaintiffs' software, using similar branding and list of clients; and (ii) the defendants retained employment at the plaintiffs while developing competing products under the ninth defendant. Based on the above allegations and evidence, an *ex parte Anton*

Piller order was granted against all defendants to prevent evidence tampering or destruction. This was subsequently confirmed though an *inter parte Anton Piller* order ('order'). The second defendant appealed against the said order, at the Court of Appeal, and the appeal was allowed; the order against the second defendant was then set aside. The plaintiffs' application for leave to appeal to the Federal Court bore no success. Hence, the present assessment of damages payable to the second defendant, pursuant to the plaintiffs' cross-undertaking as to damages. The issues that arose for determination were: (i) whether the damages incurred by the second defendant resulted from the failed order; and (ii) how much in damages was the second defendant entitled to, considering the relevant factors and the impact of the failed order. On damages, the second defendant contended that: (i) a sum of RM36,400 was advanced by the second defendant in satisfaction of costs orders levied against them which the second defendant contended ought to be reimbursable upon the discharge of the order; (ii) he was entitled to general damages for the distress, embarrassment and mental anguish occasioned by the execution of the order. The manner in which the order was carried out constituted a profound intrusion into the second defendant's privacy, causing significant emotional and psychological distress not only to him but also to his family. Furthermore, the second defendant asserted that the plaintiffs lacked a strong *prima facie* case to justify the granting of the order and that the order was sought and obtained on grounds that were tenuous and unsupported by credible evidence; (iii) the plaintiffs had acted maliciously in obtaining the order and their conduct warranted an award of aggravated damages to reflect the court's disapproval of their actions. The second defendant highlighted that during the *inter parte* application, the plaintiffs introduced new evidence in the form of a statutory declaration by one Mohamad Anif who alleged that he had met the second defendant and the latter had discussed the establishment of the ninth defendant and invited the former to join the company; and (iv) the plaintiffs' conduct in procuring the order was such a flagrant and reprehensible nature as to justify the imposition of punitive damages, not only to censure such behaviour but also to serve as a deterrent against analogous conduct in the future.

Held (awarding second defendant RM186,400 and costs of RM20,000):

(1) On the issue of whether the order was improperly granted against the second defendant, the answer would be in the affirmative. The second defendant had sufficiently demonstrated that the plaintiffs did not hold any copyright in the M3 software alleged to have been infringed by the defendants. The plaintiffs failed to disclose material facts, including that the impugned software products were neither the ninth defendant's primary offerings nor intended to remain in circulation and that the second plaintiff was, in fact, a dormant entity. There were no special circumstances that would warrant denying the second defendant his

rightful entitlement to seek recourse under the undertakings as to damages. The series of hardships endured by the second defendant could be directly attributed to the failed order. The issuance and subsequent execution of this intrusive order facilitated the unwelcome presence and entry of strangers into the second defendant's home, including private areas such as bedrooms, resulting in significant disruption and invasion of personal space. The order also led to the involuntary handover of the second defendant's contents to an unidentified party, without prior notice or adequate safeguards, further compounding the breach of the second defendant's rights. The chain of events inflicted considerable fear and distress upon the second defendant while the invasive and unwarranted actions subjected him to embarrassment and speculation among his peers and family. Additionally, the order precipitated further legal proceedings as the second defendant sought to challenge and rectify the consequences of the unjustified order, imposing an additional burden of time, expenses and emotional strain. These events collectively underscored the causal link between the failed order and the multifaceted harm suffered by the second defendant. (paras 18-19 & 21-22)

(2) The sum of RM36,400 paid by the second defendant to the plaintiffs, in compliance with five connected cost orders, was properly recoverable as special damages. These payments were directly necessitated by the now-discharged order and it was only just and equitable that the second defendant be reimbursed for this amount. Accordingly, the sum of RM36,400 under this head of claim was awarded. (para 26)

(3) The Court of Appeal found that the basis of the plaintiffs' application was more on inference than direct evidence. There was an unequivocal duty to disclose all material facts when making such an application. While the execution of the order could be distressing, the second defendant had not provided sufficient evidence to substantiate the extent of the distress claimed. Be that as it may, the execution of the order, which commenced at 10am on 23 August 2021 and extended over a period of seven hours without interruption for a lunch break, undoubtedly caused some degree of distress and inconvenience to the second defendant and his family. A further element of financial burden was also considered in such award. While legal fees could not be claimed as special damages, the financial burden of litigation may still be considered when assessing general damages. The financial burden of defending against the order and related proceedings had undoubtedly placed a significant strain on the second defendant. Therefore, RM100,000 was awarded as general damages for the wrongful seizure and undue detention. (paras 29-31)

(4) The order was a draconian order and its misuse should be discouraged. The introduction of the statutory declaration by Mohamad Anif, which was later proven to be false, also raised serious concerns about the plaintiffs' conduct in securing the order. The reliance on such evidence, which was demonstrably inaccurate and subsequently retracted, underscored a troubling lack of due diligence and a disregard for the truth in their pursuit of the order. The plaintiffs' conduct of introducing the false statutory declaration by Mohamad Anif, its failure to give full and frank disclosure, coupled with the intrusive and distressing execution of the order, justified an award of aggravated damages to reflect the court's disapproval of the plaintiffs' actions. The harm inflicted on the second defendant was intensified by the manner in which the order was used, seemingly to teach the second defendant a lesson despite the lack of credible evidence to substantiate a strong *prima facie* case against him. RM50,000 was awarded as aggravated damages to acknowledge the additional distress, humiliation and sense of injustice. (paras 36, 37 & 42)

(5) This matter did not fall within the recognised categories for awarding exemplary damages. Specifically, there was no evidence of oppressive, arbitrary or unconstitutional conduct by a Government official. Nor was this a case where the plaintiffs' actions were calculated to generate a profit that would likely exceed any compensation payable to the second defendant. In the absence of such circumstances, the second defendant's claim for exemplary damages must be disallowed. (para 45)

Case(s) referred to:

Attorney-General v. Albany Hotel Co [1896] 2 Ch 696 ***(refd)***
Chappel v. Davidson [1856] 8 De GM & G 1 ***(refd)***
Cheltenham And Gloucester Building Society v. Ricketts [1993] 1 WLR 1545 ***(refd)***
Eastglen International Corp v. Monpare SA [1986] 137 NLJ 56 ***(refd)***
Golden Star & Ors v. Ling Peek Hoe & Anor And Another Appeal [2024] 6 CLJ 487 FC ***(refd)***
Graham v. Campbell [1877] 7 Ch D 490 ***(refd)***
Jeffery Law Siew Su & Ors v. Yu Gui [2017] 4 CLJ 665 FC ***(refd)***
Novello v. James [1854] 5 De GM & G 876 ***(refd)***
Rookes v. Barnard [1964] 1 All ER 367 ***(refd)***
Sigma Glove Industries Sdn Bhd & Ors v. Ong Chin Kok & Anor [2019] CLJU 1370; [2019] 1 LNS 1370 HC ***(refd)***
Smith v. Day [1882] 23 Ch D 421 ***(refd)***
Sunseekers Pte Ltd v. JSH Joshua [1990] 1 CLJ 1048; [1990] 3 CLJ (Rep) 979 ***(refd)***
Ushers Brewery Ltd v. PS King & Co (Finance) Ltd [1972] Ch 148 ***(refd)***
Wakefield v. Due Of Buccleugh [1865] 11 Jur NS 523 ***(refd)***
Wong Kok Leong v. Foo Chu Jong & Anor [2022] CLJU 1833; [2022] 1 LNS 1833 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 37 r. 1

For the plaintiffs - Ng Zong Hui; M/s Kheng Floe & Lee Yuen
For the 2nd defendant - Mohd Rizal Bahari & Amirfarid Nawawi; M/s Bahari & Bahari

Reported by Najib Tamby

JUDGMENT

Yusrin Faidz Yusoff JC:

Introduction

[1] This judgment concerns encl. 377, which is the assessment of damages payable to the second defendant ("D2") pursuant to the plaintiffs' cross-undertaking as to damages. This obligation arose after the discharge of an *Anton Piller* order ("APO") obtained against D2. Initially granted *ex parte* by this court to preserve evidence linked to allegations of intellectual property infringement and breach of trust, the APO was later unseated by the Court of Appeal, which decreed that the order should never have been issued against D2. Thus, the stage is now set for this court to grapple with the pivotal question: what loss has D2 suffered due to the wrongful execution of the APO, for which the plaintiffs, by their cross-undertaking, are bound to answer?

Background Facts

[2] M3 Technologies (Asia) Berhad and M3 Online Sdn Bhd ("plaintiffs") developed and marketed software products over 20 years, including M3 Blast, i3TeamWorks, i3Display, and i3AppsBuilder. D2 through D8 were former or current employees of the plaintiffs in critical roles such as management, operations, and R&D. Amaz Digital Sdn Bhd ("D9") was incorporated shortly after the resignation of some defendants, with its directors and shareholders being former employees.

[3] The plaintiffs allege that D9 launched products mirroring plaintiffs' software, using similar branding and client lists. It is alleged that defendants retained employment at the plaintiffs while purportedly developing competing products under D9. In substantiating their claim, the plaintiffs showed D9's use of marketing materials referencing the plaintiffs' clients and software. E-mail checks is argued to reveal connections between D9 and its former employees. D2, who was a former managing director of the plaintiffs, is suspected to be the person behind the scene as well as the funder of D9. Therefore, based on these allegations and the available evidence, the *ex parte* APO was granted by my predecessor against all defendants on 19 August 2021 to prevent evidence tampering or destruction. This was subsequently confirmed through an *inter parte* APO on 20 January 2022.

[4] Affected by the APO, D2 filed an appeal to the Court of Appeal wherein his appeal was allowed with costs of RM30,000; and that the APO against D2 was set aside. The plaintiffs' application to the Federal Court seeking leave to appeal was dismissed on 13 December 2023 with costs of RM30,000. The relevant portion of the Court of Appeal's 14 July 2023 order granting the right to assess damages states as follows:

> (b) Permohonan Perayu di dalam Rayuan Sivil No.: W-02(IM)(IPCv)-296-02/2022 dan W-02(IM)(IPCv)-297-02/2022 dibenarkan setakat mana gantirugi akan ditaksirkan oleh Mahkamah Tinggi;

[5] Following an assessment of damages in accordance with a notice issued under O. 37 r. 1 of the Rules of Court 2012 ("the Rules"), I had on 4 October 2024, granted the total sum of RM186,400 along with costs of RM20,000, in favour of D2. My decision encompasses the following:

(i) with regards to special damages, I awarded the sum of RM36,400 to D2;

(ii) with regards to general damages, I awarded the sum of RM100,000 to D2;

(iii) with regards to aggravated damages, I awarded the sum of RM50,000 to D2;

(iv) D2's claim for exemplary damages is disallowed; and

(v) interest at 5% per annum on the judgment sum to be calculated from 4 October 2024 until the date of full realisation.

[6] By a notice of appeal dated 17 October 2024, the plaintiffs have appealed against the entirety of the aforementioned decision. Meanwhile, *vide* a notice of appeal dated 2 November 2024, D2 is cross-appealing on the issue of quantum granted for general and special damages, as well as against my decision to disallow exemplary damages. This judgment is prepared for, and equally applies to, both appeals.

Issues

[7] The application addresses the following issues:

(i) whether damages incurred by D2 resulted from the failed APO (causation); and

(ii) how much in damages D2 is entitled to, considering the relevant factors and the impact of the failed APO ('quantum').

Causation

Counsels' Contentions On The Issue Of Causation

[8] Learned counsel for the plaintiffs, Ng Zong Hui, argues that such element of causation is absent and therefore no damages can be claimed. The following paragraph in *Jeffery Law Siew Su & Ors v. Yu Gui* [2017] 4 CLJ 665; [2017] 3 MLJ 1 per Jeffrey Tan FCJ is cited to support the plaintiffs' contention:

> [8] *'The fact that an inquiry/assessment of damages has been directed ... does not raise a presumption that damage has in fact been suffered' .... At the inquiry the onus is on the defendant to prove both the fact of damage and its causation* ... The defendant must show that both the type of loss and any links in the chain of causation can reasonably be regarded as having been in the contemplation of the parties when the injunction was granted ... Causation must be established not simply on a 'but for' basis; *prima facie* the undertaking must be shown to be the exclusive cause of the loss ... There must be a causal link between the injunction and the damage suffered by the defendant ... 'In the end ... the question becomes one of fact: did the making of the order cause the loss? The onus of proof must, in accordance with general principles, lie on the defendant who asserts that he sustained damage by reason of the order' ... (emphasis added)

[9] Learned counsel for D2, Mohd Rizal Bahari, contends with conviction that the damages incurred by D2 have been factually and unequivocally demonstrated to be a direct consequence of the APO. These encompass both pecuniary losses and non-pecuniary hardships, including the unwarranted intrusion into D2's privacy, the distress occasioned by the invasive search of personal spaces, and the tarnishing of D2's reputation. In light of the evidence presented, D2 seeks redress in the form of special damages amounting to RM708,177, along with general, aggravated, and exemplary damages to address the full spectrum of harm suffered and to serve as a deterrent against such unwarranted actions.

Court's Findings On The Issue Of Causation

[10] The requirement of an undertaking in damages as a condition for the grant of an interim injunction finds its roots in mid-19th century jurisprudence, as illustrated by cases such as *Novello v. James* [1854] 5 De GM & G 876, *Chappel v. Davidson* [1856] 8 De GM & G 1, and *Wakefield v. Due Of Buccleugh* [1865] 11 Jur NS 523. This undertaking to damages is not extended to the party against whom the interim order is obtained but to the court itself. In essence, the plaintiff undertakes to comply with any order which the court may make as to damages should it later determine that the defendant or any innocent third party has suffered harm as a result of the order, and that such harm ought to be compensated by the plaintiff.

[11] In *Attorney-General v. Albany Hotel Co* [1896] 2 Ch 696, it was held that the entitlement to damages does not arise independently of the undertaking, nor automatically upon the occurrence of a material event, but from the decision of the court. Applying this to our case, the judgment handed down by the Court of Appeal on 14 July 2023 serves as the basis for the recognition of such a right.

[12] Regarding the exercise of its discretionary powers, reference is made to the case of *Cheltenham And Gloucester Building Society v. Ricketts* [1993] 1 WLR 1545. In that case, the English Court of Appeal, through Peter Gibson LJ at pp. 1554 to 1555, articulated the following principle:

> The form of the undertaking indicates that the court has a discretion whether to enforce it at all and that discretion is not limited in any way.

[13] In the same case, Neill LJ at pp. 1550 to 1551 elaborated as follows:

> When granting an injunction of an interlocutory nature it is the usual practice of the court to require the plaintiff to give an undertaking as to damages. *The use of the word "damages" is perhaps inappropriate because it might suggest that the grant of the injunction involved a breach of some legal or equitable rights of the defendant. The undertaking is given to the court and is intended to provide a method of compensating the party enjoined if it subsequently appears that the injunction was wrongly granted.* (emphasis added)

[14] In *Ushers Brewery Ltd v. PS King & Co (Finance) Ltd* [1972] Ch 148, it was held that if a defendant who has been restraint by an interim injunction, obtains a judgment establishing his right to do the act in question, he may obtain compensation for any injury sustained by him on the account of the restraint. In *Graham v. Campbell* [1877] 7 Ch D 490, James LJ held (at p. 494) as follows:

> The undertaking as to damages which ought to be given in every interlocutory injunction is one to which **(unless under special circumstances)** effect ought to be given. If any damage has been occasioned by an interlocutory injunction, which, on the hearing, if found to have been wrongly asked for, justice requires that such damage should fall on the voluntary litigant who fails, not on the litigant who has been without just cause made so. (emphasis added)

[15] In *Cheltenham And Gloucester Building Society v. Ricketts* (*supra*), Peter Gibson LJ observed, with clarity and precision, that the plaintiffs' good faith, court's refusal to order costs against the unsuccessful plaintiff, and the inequitable conduct of the defendant, could constitute special circumstances sufficient to bar the defendant from recovering damages (at p. 1557):

> There are only a few reported decisions on what constitute special circumstances ... In *Modern Transport Co. Ltd. v. Duneric Steamship Co* [1917] 1 KB 370, 380, Swinfen Eady LJ said that inequitable conduct by the defendant constituted special circumstances such that no inquiry as to damages was to be granted even if the claim for an injunction could not be sustained at the trial; but that was a case where he held that the plaintiffs were justified in applying for an interlocutory injunction. In *Upper Canada College v. City of Toronto* (1917) 40 OLR 483, the court in refusing to order an inquiry as to damages on an undertaking given on the grant of an interlocutory injunction discharged at the trial, had regard to a

number of circumstances including the *good faith of the plaintiffs and the fact that no costs were awarded against them when the action was dismissed. In Attorney-General for Ontario v. Harry (1982) 25 CPC 67 a factor taken into account by the court in refusing to enforce an undertaking as to damages, notwithstanding the discharge at the trial of the interlocutory injunction, was the inequitable conduct of the defendants.* (emphasis added)

[16] Like any failed interlocutory orders, the analysis on the issue of causation of losses suffered in a failed APO order generally focuses on whether the losses directly result from the wrongful grant or execution of the order. Based on the above authorities, courts assess causation by examining the nexus between the applicant's conduct, the order's issuance, and the harm claimed by the respondent. Key principles include:

(i) direct causation: the defendant must demonstrate that the losses were directly caused by the improper grant or execution of the APO, not merely incidental or speculative damages;

(ii) plaintiff's fault: courts evaluate whether the plaintiff acted with bad faith, failed to make full and frank disclosure, or misused the order, contributing to the losses;

(iii) whether special circumstances exist: courts consider whether any exceptional or special circumstances exist that would justify limiting or denying the defendant's entitlement to such damages;

(iv) reasonableness of losses: the defendant must prove that the losses were reasonably foreseeable and flowed naturally from the wrongful order; and

(v) remedial measures: courts may limit damages if the defendant failed to mitigate their losses or if the losses were exaggerated.

[17] Ultimately, the court aims to balance the need to protect the plaintiff's legitimate interests while ensuring that the defendant is not unjustly burdened by improperly granted orders.

[18] On the issue of whether the APO was improperly granted against D2, I am of the considered view that the answer would be in the affirmative. This is so as D2 has sufficiently demonstrated that the plaintiffs do not hold any copyright in the M3 software alleged to have been infringed by the defendants. Based on the evidence, the plaintiffs sought to implicate D2 as a conspirator based solely on a WhatsApp exchange between an unidentified private investigator and the fifth defendant (D5). Such unsubstantiated allegations fail to establish a strong *prima facie* case, particularly when none of the items seized from D2 were included in the plaintiffs' bundle of documents for trial.

[19] Moreover, the plaintiffs failed to disclose material facts to the court, including that the impugned software products are neither D9's primary offerings nor intended to remain in circulation, and that the second plaintiff is, in fact, a dormant entity. Looking at the evidence led during assessment, I find no special circumstances that would warrant denying D2 their rightful entitlement to seek recourse under the undertaking as to damages.

[20] Although there is no direct evidence to establish that the APO formed part of a malicious prosecution against D2 arising from his refusal to support the first plaintiff's proposal at the extraordinary general meeting, as well as his motion to remove the first plaintiff's directors in collaboration with D1 and others, I find that such circumstances may well explain the plaintiffs' motive in fabricating evidence. This is particularly evident in their reliance on the false statutory declaration of Mohamad Anif, which was later retracted and admitted to be untrue during the committal proceedings. The introduction of such unreliable evidence raises serious questions about the plaintiffs' conduct and suggests a calculated effort to bolster their case against D2, despite the lack of a credible foundation.

[21] From the evidence led during the assessment hearing, I am of the considered view that the series of hardships endured by D2 can be directly attributed to the failed APO. The issuance and subsequent execution of this intrusive order facilitated the unwelcome presence and entry of strangers into D2's home, including private areas such as bedrooms, resulting in significant disruption and invasion of personal space. These strangers conducted searches through D2's belongings and personal information, as well as those of his family members, exacerbating the intrusion into their privacy.

[22] It is also observed that the APO led to the involuntary handover of D2's personal contents to an unidentified party, Messrs Himahlini & Co, without prior notice or adequate safeguards, further compounding the breach of D2's rights. This chain of events inflicted considerable fear and distress upon D2, while the invasive and unwarranted actions subjected him to embarrassment and speculation among his peers and family. Additionally, the APO precipitated further legal proceedings as D2 sought to challenge and rectify the consequences of the unjustified order, imposing an additional burden of time, expenses, and emotional strain. These events collectively underscore the causal link between the failed APO and the multifaceted harm suffered by D2.

Quantum

Special Damages

Counsels' Contentions On The Issue Of Special Damages

[23] D2 initially asserted special damages in the sum of RM708,177, the bulk of which pertained to legal fees expended in the defence against the APO and associated proceedings. In substantiation of this claim, D2 tendered

invoices aggregating RM671,777, which encompassed legal fees, payments to forensic experts, and sundry incidental expenses. Additionally, a sum of RM36,400 was advanced by D2 in satisfaction of costs orders levied against them, which D2 now contends ought to be reimbursable upon the discharge of the APO.

[24] Learned counsel for the plaintiffs argued that legal fees are not recoverable as damages, citing the Federal Court case of *Golden Star & Ors v. Ling Peek Hoe & Anor And Another Appeal* [2024] 6 CLJ 487; [2024] MLJU 909 per Mary Lim Thiam Suan FCJ, which held that legal fees incurred in the same proceedings cannot be claimed as special damages. Learned counsel for the plaintiffs also challenged the authenticity of the invoices, noting that they were issued only in 2023, long after the work was done in 2021, and that no receipts were provided to prove payment.

Court's Findings On The Issue Of Special Damages

[25] During oral submission, learned counsel for D2 has conceded, based on the Federal Court's decision in *Golden Star & Ors v. Ling Peek Hoe & Anor And Another Appeal* (*supra*), that D2's claim for legal fees of RM671,777 is not claimable and has agreed to withdraw this claim. Based on this, their special damages have been reduced to the sum of RM36,400.

[26] Upon careful consideration of the evidence adduced and a thorough examination of the relevant cost orders, I am satisfied that the sum of RM36,400, paid by D2 to the plaintiffs in compliance with five connected cost orders, is properly recoverable as special damages. These payments were directly necessitated by the now-discharged APO, and it is only just and equitable that D2 be reimbursed for this amount. Accordingly, I award the sum of RM36,400 under this head of claim.

General Damages

Counsels' Contentions On The Issue Of General Damages

[27] Based on D2's submissions, it is contended that he is entitled to general damages for the distress, embarrassment, and mental anguish occasioned by the execution of the APO. Learned counsel for D2 argued that the manner in which the APO was carried out constituted a profound intrusion into D2's privacy, causing significant emotional and psychological distress not only to him but also to his family. Furthermore, D2 asserts that the plaintiffs lacked a strong *prima facie* case to justify the granting of the APO, and that the order was sought and obtained on grounds that were, at best, tenuous and unsupported by credible evidence.

[28] Learned counsel for the plaintiffs contended that D2 had not provided sufficient evidence to prove the distress and mental suffering claimed. They relied on the report of the supervising solicitors, which indicated that the

APO was executed in a calm and orderly manner, with D2's consent and in the presence of his lawyer. Counsel for the plaintiffs also argued that the APO was discharged on procedural grounds, not due to any malicious conduct on their part.

Court's Findings On The Issue Of General Damages

[29] Based on the facts, the first criticism concerns the way in which the APO was obtained. At the outset, it is an obvious consequence of an *ex parte* application that there is no adversarial argument. Based on the evidence presented, the Court of Appeal found that the basis of the plaintiffs' application was more on inference than direct evidence. There is an unequivocal duty to disclose all material facts when making such an application. Based on D2's submissions, the Court of Appeal found that my learned predecessor failed to articulate in his grounds the specific factors that led him to conclude the existence of a strong *prima facie* case. This lack of reasoning, it is contended, underpins the Court of Appeal's finding that the APO was unmeritorious.

[30] While I accept that the execution of an APO can be distressing, I find that D2 has not provided sufficient evidence, such as medical reports or other corroborative evidence, to substantiate the extent of the distress claimed. Be that as it may, I am satisfied that the execution of the APO, which commenced at 10am on 23 August 2021 and extended over a period of seven hours without interruption for a lunch break, undoubtedly caused some degree of distress and inconvenience to D2 and his family. The prolonged and intrusive nature of the execution, coupled with the absence of any respite, would have undoubtedly exacerbated the emotional and psychological toll on D2 and his household.

[31] A further element of financial burden is also considered in such award. While legal fees cannot be claimed as special damages, courts may still consider the financial burden of litigation when assessing general damages. For example, in cases involving breach of contract or tort, the court may take into account the claimant's overall financial loss, including the indirect impact of legal fees, when determining the quantum of general damages. In this case, the financial burden of defending against the APO and related proceedings has undoubtedly placed a significant strain on D2. This factor has been taken into account in assessing the quantum of general damages awarded.

[32] In light of the circumstances, I award RM100,000 as general damages for the wrongful seizure and undue detention.

Aggravated Damages

Counsels' Contentions On The Issue Of Aggravated Damages

[33] Here, D2 sought aggravated damages, arguing that the plaintiffs had acted maliciously in obtaining the APO and that their conduct warranted an award of aggravated damages to reflect the court's disapproval of their actions. D2 highlighted that during the *inter parte* application, the plaintiffs introduced new evidence in the form of a statutory declaration by Mohamad Anif dated 13 September 2021. In this declaration, Mohamad Anif alleged that he had met D2 on 4 or 5 April 2021, during which D2 purportedly discussed the establishment of D9 and invited Mohamad Anif to join the company.

[34] D2 presented unrebutted evidence that no such meeting took place on 4 or 5 April 2021. It was established that Mohamad Anif never visited D2's residence on those dates, let alone engaged in any discussions about joining D9. This was later acknowledged by Mohamad Anif himself during the committal proceedings, where he admitted that no meeting had occurred on the alleged dates and even apologised for the false claim. This revelation casts serious doubt on the credibility of the evidence relied upon by the plaintiffs to justify the APO and raises questions about the plaintiffs' conduct in obtaining the order.

[35] Learned counsel for the plaintiffs argued that aggravated damages are not warranted because the APO was discharged on procedural grounds, and there was no finding of malicious or reprehensible conduct on their part. They relied on the case of *Sigma Glove Industries Sdn Bhd & Ors v. Ong Chin Kok & Anor* [2019] CLJU 1370; [2019] 1 LNS 1370; [2019] MLJU 1045, where Lim Chong Fong J (as His Lordship then was) held that aggravated damages are only awarded if the APO was discharged due to the plaintiff's unlawful or reprehensible conduct.

Court's Findings On The Issue Of Aggravated Damages

[36] From the evidence led during the assessment hearing, I find that while the APO was discharged on procedural grounds, the plaintiffs' conduct in obtaining the order without a strong *prima facie* case and without full disclosure of material facts justifies an award of aggravated damages. The APO is a draconian order, and its misuse should be discouraged.

[37] The introduction of the statutory declaration by Mohamad Anif, which was later proven to be false, also raises serious concerns about the plaintiffs' conduct in securing the order. The reliance on such evidence, which was demonstrably inaccurate and subsequently retracted, underscores a troubling lack of due diligence and a disregard for the truth in their pursuit of the APO.

[38] This is precisely why this court allows the assessment of damages to proceed without waiting for the outcome of the full trial. On one hand, it could be argued that none of the defendants are entitled to claim compensation for losses resulting from being barred from marketing their allegedly infringing products, as their right to do so has not yet been determined at trial. Nevertheless, I am of the considered view that the strength of the plaintiffs' case does not necessarily provide a definitive defence against enforcing the undertaking as to damages. An award under the undertaking for damages could be justified solely on the grounds that the plaintiffs obtained the APO through improper means.

[39] This scenario is contemplated in *Smith v. Day* [1882] 23 Ch D 421 at p. 425 where Jessel MR said:

> It may happen that an interlocutory injunction is dissolved for delay or some cause which disentitles the Plaintiff to an interlocutory injunction, though not to relief at the trial, and then at the trial a perpetual injunction is granted. The Court in such a case has a discretion whether, under all the circumstances, the Defendant ought to have damages in respect of the interlocutory injunction having been improperly granted, though a perpetual injunction is granted at the trial.

[40] It is my considered view that the authority to mandate an inquiry into damages promptly upon the discharge of any *ex parte* APO, without deferring the matter to trial, inherently encompasses the potential to award damages for procedural, as opposed to substantive, infringements. This interpretation flows naturally from the breadth of discretion vested in the court to ensure justice is administered in a timely and equitable manner.

[41] In *Eastglen International Corp v. Monpare SA* [1986] 137 NLJ 56, Sir John Donaldson MR stressed the importance of the sanctions for non-disclosure:

> I stand by everything that I said in the Bank Mellat case about the importance of full and frank disclosure, and I would support any policy of the courts which was designed to buttress that by declining to give anybody any advantage from a failure to comply with that obligation. I would go further and say that *it is no answer that if full and frank disclosure had been made you might have arrived at the same answer and obtained the same benefit. This is the most important duty of all in the context of ex parte applications.*
>
> (emphasis added)

[42] I am of the view that the plaintiffs' conduct of introducing the false statutory declaration by Mohamad Anif, its failure to give full and frank disclosure, coupled with the intrusive and distressing execution of the APO, justifies an award of aggravated damages to reflect the court's disapproval of the plaintiffs' actions. The harm inflicted on D2 was intensified by the manner in which the APO was used, seemingly to teach D2 a lesson despite

the lack of credible evidence to substantiate a strong *prima facie* case against him. In light of these circumstances, I find it appropriate to award RM50,000 as aggravated damages to acknowledge the additional distress, humiliation, and sense of injustice experienced by D2 as a result of the plaintiffs' conduct.

Exemplary Damages

Counsels' Contentions On The Issue Of Exemplary Damages

[43] Learned counsel for D2 has advanced the contention that D2 is entitled to an award of exemplary damages. It is submitted, in support of this proposition, that the plaintiffs' conduct in procuring the APO was of such a flagrant and reprehensible nature as to justify the imposition of punitive damages, not only to censure such behaviour but also to serve as a deterrent against analogous conduct in the future.

[44] Learned counsel for the plaintiffs argued that exemplary damages are not recoverable in an assessment of damages following the discharge of an APO, as the source of such damages is the plaintiff's voluntary undertaking, not any wrongful act. They relied on the case of *Wong Kok Leong v. Foo Chu Jong & Anor* [2022] CLJU 1833; [2022] 1 LNS 1833; [2022] MLJU 1872, where Amarjeet Singh Serjit Singh J held that exemplary damages do not fall within the scope of damages recoverable under an undertaking for an *ex parte* injunction. This is based on His Lordship's reference to the decision of *Sunseekers Pte Ltd v. JSH Joshua* [1990] 1 CLJ 1048; [1990] 3 CLJ (Rep) 979; [1990] 2 MLJ 350 where Chan Sek Keong J held as follows:

> In both contract and tort it is enough that the breach of contract or duty is one direct cause of whatever damage a plaintiff has suffered – *McGregor on Damages*, 13th ed. (1972), pp. 69, 118. The breach is a wrongful act on the defendant's part and the common law visits him with liability for the consequences to the plaintiff, subject always to rules as to remoteness. But *a plaintiff who sues for an injunction and obtains interlocutory relief, giving an undertaking to the court as the price of that relief, commits no wrongful act, no breach of contract or of duty when, at the trial, he fails to obtain any perpetual injunction.* If, as a result of the grant of interlocutory relief, the defendant has been harmed there will, however, have been injustice and, an undertaking having been given, the court will thereby have been armed with jurisdiction, otherwise lacking, to right that injustice and compensate the defendant for the harm done to him. (emphasis added)

[45] I am in agreement with the submission of learned counsel for the plaintiffs regarding the inapplicability of exemplary damages in this case. In any event, applying the principles established in *Rookes v. Barnard* [1964] 1 All ER 367, this matter does not fall within the recognised categories for awarding exemplary damages. Specifically, there is no evidence of oppressive, arbitrary, or unconstitutional conduct by a Government official.

A Nor is this a case where the plaintiffs' actions were calculated to generate a profit that would likely exceed any compensation payable to D2. In the absence of such circumstances, D2's claim for exemplary damages must be disallowed.

Decision

B

[46] After considering the facts and circumstances presented, it is therefore ordered that the plaintiff shall pay D2 the total sum of RM186,400 as damages with interest at 5% per annum on the judgment sum to be calculated from 4 October 2024 until full realisation; together with costs of RM20,000.

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